Laguna College of Art and Design *and* Service Employees International Union, Local 721, Petitioner. Case 21–RC–128268

June 15, 2015

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

The National Labor Relations Board, by a three-member panel, has considered objections to a mail-ballot election, which commenced on June 19, 2014, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 35 for and 32 against the Petitioner, with 1 void ballot, and 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's rulings,[1] findings,[2] and recommendations,[3] and finds that a certification of representative should be issued.

[1] We find no merit to the Employer's exception that the hearing officer committed prejudicial error by granting prounion Supervisor James Galindo's oral petition at the hearing to quash a subpoena—which sought "all documents in [Galindo's] control relating to his involvement in the organizing campaign or the representation election"—as it related to his personal email and text messages. Citing *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), the Employer argues that the hearing officer erred by finding this information "superfluous" without making an in camera inspection, resulting in an incomplete record. We disagree. We note initially that, unlike the employer in *Ozark*, the Employer here did not expressly object to the hearing officer's ruling or file a motion with the Regional Director to consider a special appeal of that ruling. In any event, the exception is without substantive merit. In response to the subpoena, Galindo produced all of the employer system emails he sent to bargaining unit members. In addition, prior to the hearing officer's ruling on the record to quash the subpoena in relevant part, Galindo testified that the withheld personal emails and text messages were sent only to three coworkers on the organizing committee (the "inner circle") and to two union officials, and they involved organizing strategy. The Employer does not except to the hearing officer's crediting of Galindo's testimony about the scope and content of these communications. Accordingly, unlike in *Ozark*, the hearing officer had a reasonable evidentiary basis for finding that requiring Galindo to produce his personal emails and texts about organizing strategy would add little to the central question of whether Galindo engaged in prounion conduct that would have reasonably tended to interfere with bargaining unit employees' freedom of choice in the election. In the circumstances presented here, we find that the Employer's interests in obtaining the subpoenaed documents about this prounion conduct are outweighed by the considerable interests of Galindo and his inner circle coworkers in keeping their Sec. 7 activity confidential. See *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 fn. 1 (2015); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995).

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the hearing officer's recommendation to overrule the Employer's objections, we note that he erroneously considered the Employer's potentially mitigating conduct under the first, rather than the second, prong of the objective test established in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). See *Terry Machine Co.*, 356 NLRB No. 120, slip op. at 4 (2011); *Fidelity Healthcare & Rehab Center*, 349 NLRB 1372, 1373 (2007). As to factors traditionally considered under the first prong—i.e., whether Galindo's prounion conduct reasonably tended to coerce or interfere with employee free choice—we note that Galindo was a low-level supervisor who engaged in noncoercive election behavior, including signing an authorization card in the presence of two employees, inquiring whether three employees were interested in signing authorization cards, emailing the bargaining unit about unionization, and being quoted in a prounion flyer. Regarding the potentially most troubling conduct, his inquiries to the three employees, we emphasize that Galindo did not have direct supervisory authority over those employees, nor did he furnish them with authorization cards. Contrast *Glen's Market*, 344 NLRB 294, 295 (2005) (where no evidence that supervisors directed their prounion activities toward any employee they supervised, their conduct could not reasonably have coerced or interfered with employees' free choice) with *SNE Enterprises*, 348 NLRB 1041, 1042 (2006) (supervisors' conduct found coercive where they solicited direct subordinates). As to factors traditionally considered under the second prong—i.e., whether Galindo's prounion conduct materially affected the election outcome—we find that the Employer's contemporaneous, aggressive antiunion campaign ensured that employees would not attribute Galindo's prounion views to the Employer and effectively mitigated any potentially material interference of his noncoercive conduct on the election outcome, even considering the narrow margin of the Petitioner's victory. See, e.g., *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006); *Fidelity Healthcare & Rehab Center*, above at 1373 & fn. 10. Having overruled the objection on those grounds, we find it unnecessary to address the alternative theory endorsed by our colleague.

Member McFerran agrees with her colleagues that the hearing officer did not commit prejudicial error by granting James Galindo's oral petition to quash the subpoena, and she joins her colleagues in adopting the hearing officer's finding that Galindo's prounion conduct was not objectionable pursuant to *Harborside Healthcare, Inc.*, above. In addition, however, she would find that the Employer is estopped from relying on Galindo's prounion conduct to challenge the results of the election. Galindo notified his own direct supervisor, as well as the Employer's president and the vice president of academic affairs, not only of his general intent to support the Union campaign "publicly and openly," but also of certain specific action that he had taken, including allowing the Union to use his photograph and statements supporting unionization in flyers. The Employer did not instruct Galindo to cease his activities or even to make it clear that he was speaking on his own behalf and not representing the Employer's position, all the while not appearing to entertain serious doubts about whether Galindo was a supervisor. Further, the Employer itself engaged in an active antiunion campaign, yet it never addressed or disavowed Galindo's actions. Allowing the Employer to challenge the results of the election here, where the Employer knew of and to all appearances condoned the prounion actions of a supervisor, contravenes the well-established

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Service Employees International Union, Local 721, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All part-time faculty, including adjuncts and instructors, who are employed by Laguna College of Art and Design to teach in the programs and academic units of the College and who teach at least one-credit earning class, lesson, or lab at the College's instructional facilities located at the following addresses: 2222 Laguna Canyon Road ("Main Campus"), 2825 Laguna Canyon Road ("Big Bend Campus"), 2633 Laguna Canyon Road ("Graduate Studies Building"), and 2295 Laguna Canyon Road ("Suzanne Chonette Senior Studios"), but excluding all other employees specifically: all full time faculty; all artists in residence; all visiting instructors; all community education instructors; all faculty teaching in locations other than the College's instructional facilities as defined above; all faculty teaching online courses exclusively (regardless of location); all graduate students; all lab assistants, graduate assistants, teaching associates, clinical fellows, teaching fellows, teaching assistants and research assistants; all mentors; all full-time staff or administrators, whether or not they also have teaching responsibilities; all deans, registrars, and librarians; all volunteers; all other represented employees; all clerical employees, managers, supervisors, and guards as defined in the Act.

Dated, Washington, D.C. June 15, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

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principle that a party to an election case is estopped from relying on its own misconduct as objectionable. See *B. J. Titan Service Co.*, 296 NLRB 668, 668 (1989); *Republic Electronics*, 266 NLRB 852, 853 (1983). See also *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 639 (4th Cir. 1988) ("[A]n employer might well contest a representation petition on the merits and then seek a second bite of the apple by objecting to the result based on the 'fifth column' activity of its own supervisors"); *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223, 226 (4th Cir. 1981) ("If an employer is aware of a supervisor's union activities and then stands idly by, the employer cannot subsequently rely on the supervisor's conduct for setting aside a representation election"). Because Member McFerran would find that the Employer is estopped from challenging the results of the election, she would further find that the hearing officer's ruling on the subpoena, even if incorrect, was harmless error.